



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 498 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 26th January, 2021)

JOSEPH AYORA OMWENA.....CLAIMANT

-VERSUS-

MULTISCOPE CONSULTING ENGINEERING LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim alleging that he was unfairly and unlawfully terminated by the Respondent for a reason that the Respondent's contract with its contractor China Wu Yi needed a less experienced surveyor to the project than him. He contended that he was neither an employee of the contractor nor was he answerable to the contractor.

2. The Claimant seeks the following reliefs;

a. Unpaid salary 3 months and

15 days August 2015 Kshs. 665,000/-

b. Refund of unlawful deducted

family medical cover Kshs. 101,734/-

c. Unpaid house allowance for 43 months

at 15% of basic salary Kshs. 190,000/-

d. Unpaid out of station subsistence

and travel allowance 75 days at

Kshs. 14,000 per day Kshs. 1,050,000/-

e. 12 months' salary for unfair Termination

12 months x 190,000/- Kshs. 2,280,000/-

f. Costs and interest of this claim Total sum Kshs. 5,322,234/-

3. The Respondent filed a Reply to the claim on 20th April, 2016. It avers that the Claimant applied for 15 days leave but never reported back to duty and no explanation was given hence he deserted duty. It argued that in August, the Claimant expressed his interest to be reinstated after absconding work from May to July 2015.

4. It avers that its director did not reinstate him but recommended the Claimant to render his services to its client China Wu Yi with an understanding that he would be contracted by the Resident engineer.

5. It submitted that China Wu Yi indicated to the respondent that the Claimant's position was no longer tenable and that this was communicated to the Claimant through the letter dated 26th October, 2015.

6. It alleges that the claimant is not entitled to his claims for unpaid salary allowances and damages as claims were settled on 11th November, 2015.

Claimant's case

7. The Claimant, Cw1, adopted his Witness Statement dated 29.3.2016 as his evidence-in-chief. He testified that he is a surveyor and deals with engineering surveys.

8. He testified that he was not paid his salary from May to July 2016 and the 1st August, 2016 by the Respondent. He testified that Clause 8 of his letter of appointment provided that he was entitled to a medical cover but Kshs. 101, 734 was deducted after he left. He testified that he was claiming 75 days travel allowance which he incurred while working in Mombasa as he was to be paid Kshs. 14,000 per day.

9. He testified that he was not paid house allowance and that an email was sent to him to vacate the house he occupied. He contended that he was paid Kshs. 127, 640 when he was leaving and that he was terminated on account of redundancy. He testified that he was not given any notice or reason before termination.

10. Upon cross-examination, he testified that their office was based in Nairobi but he had previously undertaken projects in Isiolo and Garissa from May 2012 to March 2016. He averred that he was appointed in April 2012 and travelled to Garissa in May 2012 where he worked until March 2015.

11. He testified that he rented an apartment in Garissa which was paid for by the Respondent. He further testified that the contract did not state that he was to be paid house allowance and that there was no payment for house allowance in his payslip. He confirmed that the email he sent to Eng. Maugo stated that he was paid Kshs. 50,000 in Mombasa by the contractor for accommodation. He testified that he was paid 2 months' rent, that his per diem was Kshs. 14,000 per day and he transport was provided for his agreement.

12. He maintained he was not given notice but was paid 1 month's salary in lieu of notice. He testified that on 11th May, 2015 he applied for 15 days leave and was to resume work on 1st June, 2015. He further testified that he was in the office all along and that the attendance sheets produced by the Respondent were 'cooked'. He contended that the document presented by the Respondent does not cover all he is claiming. He further contended that his termination letter states that the reason for his termination was redundancy.

13. Upon re-examination, he testified that he was paid night out and that when he went to Mombasa, he was paid Kshs. 95000, in Garissa he was paid Kshs. 8,000 per day and in Mombasa he was paid Kshs. 14,000 per day. He however testified that while in Nairobi, he was not paid house allowance.

14. He clarified that he went on leave for 15 days and in other years he took some days leave which he could not remember. He testified that in the attendance list produced by the Respondent his name does not appear because he never signed any attendance sheets for the 43 months he worked for the Respondent.

15. He testified that all the monies he received while in Mombasa passed through his boss and that he was entitled to a car while there.

Respondent's case

16. Samuel Nyanchama Nyaugo, the Respondent's Managing Director testified as Rw1 and adopted his Witness Statement dated 14th March, 2019. He testified that the Claimant was not on duty hence he cannot be paid. He testified that he took unpaid leave from 15 days in May and was to report in June. He however testified that the claimant was not in attendance from 8th May, 2015 up-to 31st August, 2015.

17. He testified that on insurance deduction, they recovered the amount from the premiums they had paid on his behalf. On the claim for unpaid house allowance, he contended that the letter of appointment dated 15th March, 2012 stated that he was to earn gross salary and no figure was provided for as house allowance.

18. He testified that the travel allowance to Mombasa was paid and acknowledged in the payment voucher of his final dues. According to him, the Claimant deserted duty thus there was no unfair termination.

19. In cross-examination, he testified that he did not write a letter to the Claimant enquiring where he was or that he had deserted duty. He further testified that he did not issue the claimant with a warning letter and neither did he write to the Ministry of Labour.

20. He testified that in August, 2015 the Claimant approached him as he was looking for work and that he gave him some work in the same month. He testified that the contractor was the one who employed him and their company gave him a ticket to travel to Mombasa. He however testified that the documents presented by the Claimant indicated that he was representing the Respondent. He testified that they paid him and claimed the money through their company.

21. He confirmed that Port Reitz was a contraction site and stated that the Claimant was not paid his allowance. He testified that they wrote a letter informing the Claimant that the client had declined his services.

22. In re-examination, he testified that the Claimant's Memo dated 10th November, 2015 is an admission that there was a private arrangement pending approval from the client.

Claimant's submissions

23. The Claimant submitted that he was neither called to explain the circumstances of his termination nor was the Ministry of Labour informed of the intended redundancy. He submitted that the employment terms and conditions were breached and prayed that the Court awards him damages for unfair termination. He submitted that the respondent refused to engage him with respect to his dues therefore resulting to the filing of this suit.

24. He denied deserting duty and stated that he sought leave which was granted on 11th May, 2015 and reported back on duty on 1st June, 2015. He submitted that he would not have absconded duty from 3 and a half months and that the Respondent should have within 7 days upon desertion of duty terminated him or written a warning letter. He submitted that the Claimant cannot allege desertion without any proof and urged the Court to award his outstanding salary of Kshs. 665,000.

25. He submitted that the it was malicious for the Respondent to deduct the entire medical cover of the year 2015 from his last payment. He submitted that in **Kenya Plantation and Agricultural Workers Union v James Finlay (K) Limited** that the Court observed that the Claimants were not involved in the change of terms of the medical cover thus the change of terms were illegal and unlawful and the cover was reinstated. He further relied on the **Petition 23 of 2016 of James Ang'awa Atana & 10 Others v Judicial Service Commission**.

26. He argued that his gross salary was exclusive of house allowance and when in Garissa, his staff house was issued to another staff with promise that he would be issued with another house but this did not happen. He submitted that he was entitled to out of station subsistence and travelling allowance and that it was the duty of the Respondent to pay the Kshs. 14,000 paid to it. He argued that professionals were supervised by KENHA that the internal memo for payment of allowances was a product of salaries and remuneration commission for locals and foreigners which came into effect from 1st March, 2015.

27. He argued that no evidence was adduced in Court that there was a private arrangement between the Respondent and the Claimant or the contractor. He submitted that there were no other terms of employment but the letter dated 15th March, 2012. He relied on the Court of Appeal decision in **Kenfreight (EA) Limited v Benson K. Nguti and Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 others Cause No. 90 of 2013**.

28. He submitted that the Respondent did not demonstrate that he was fairly terminated. He urged the court to find that his termination was unfair and award him 12 months' salary compensation.

Respondent's submissions

29. The Respondent submitted that the emails exchanged between the Respondent and the Claimant is proof that he was assisted to secure a direct contract in the Mombasa project. It submitted that the Claimant admits that the arrangement made by the respondent was on a short-term measure pending approval by the contractor.

30. It relied on Section 31 (2) of the Employment Act and argued that the Claimant is not entitled to the claim for house allowance since house allowance was consolidated as part of his salary. It further submitted that no evidence was tendered that the Claimant has a staff house.

31. It submitted that the contract did not provide for out of station substance and travelling allowance and that he is bound by what was agreed upon in the contract of employment and cannot introduce new terms and conditions outside the said contract. It submitted that the Internal Memo from KENHA's Director General had nothing to do with the Respondent.

32. It argued that it is not correct that the Respondent altered the Claimant's contract and that fact that it was refunded all the money he paid on behalf of the Claimant is enough demonstration there was no alteration to the contract between the Claimant and it.

33. It submitted that the claimant has not proved his case thus it should be dismissed with costs.

34. I have examined all the evidence and submissions of the Parties herein. From the Claimant's Application, he was employed as an Engineering Surveyor by the Respondent herein on 15/3/2012. The gross salary attached to this position was at the rate of 1,920,000 per annum payable in monthly instalments.

35. The appointment was subject to an initial 3 months probationary period. He was also entitled to 21 days leave and yearly bonus payment pegged on the firm's performance and his output throughout the year.

36. He was entitled to a medical cover which was in the firm's medical scheme covering the Claimant, spouse and 2 children. The Claimant reported to work on 10/4/2012.

37. From documents produced by the Claimant, he occasionally worked out of Nairobi and would be assigned work in Mombasa Port Reitz. This is evidenced from Appendix 4 and 5. The Claimant's payslip is at Appendix 6 and it shows that his basic pay was 190,000/= per month.

38. On 26/10/2015, the Claimant's contract was terminated by the Respondent. The letter of termination reads as follows:-

“We wish to let you know that the Client has informed us that they are not in a position to sustain your caliber of staff on site as the contractor is required to provide an experienced surveyor to carry out the survey works. The Assistant Employer’s representative (AER) required to be assisted by survey assistants, levelers, and Chairman as indicated in Clause 137 of Contractor’s contract. For this reason, we are only able to keep you on site until 21st October 2015. We shall process and pay your dues upto the mentioned period”.

39. My understanding of this termination letter is that the Claimant was declared redundant as his services were no longer required.

40. Redundancy is defined under Section 2 of the Employment Act 2007 as follows: -

“redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.

41. The Claimant having been declared redundant, the contention by the Respondent that he absconded duty does not hold any water.

42. Section 40 of the Employment Act 2007 states as follows:-

1) “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions: -

a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service”.

43. This section given parameters of what an employer should do in case a redundant situation arises. In the case of the Claimant herein, there is no indication that he was given any notice nor paid all his outstanding dues. It therefore follows that the redundancy was unfair and unjustified.

44. The Claimant is therefore entitled to compensation for unfair redundancy and also to payment of his terminal dues. I therefore find for the Claimant and I award him as follows: -

1. Kshs.161,734/= which had been deducted from the Claimant on account of medical cover, an amount not indicated in the contract of employment.

2. 10 months’ salary as compensation for the unfair redundancy = $190,000 \times 10 = 1,900,000/=$.

3. Payment of unpaid salary for May, June, July and 15 days of August 2015 $(190,000 \times 3) + \frac{1}{2} 190,000$

570,000 + 850,000

Total = 655,000/=

4. Unpaid out of pocket allowance as pleaded being for 75 days at the rate of 3,500/= per day in the demand notice = $75 \times 3,500 = 262,500/=$

TOTAL = 2,979,234/=

less statutory deductions

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 26th day of January, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE